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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-917

NICHOLAS ZINNI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Nicholas Zinni respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 26, 1973, and a denial of Petitioner's Motion for Re-Argument entered on November 12, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Memorandum Decision

of the District Court, and the District Court opinion regarding Petitioner's Motion for Judgment of Acquittal, N.O. V., likewise appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 26, 1973 and the Petitioner's Motion for Re-Argument was denied on November 12, 1973 and this Petition for Certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the 4th, 5th and 9th Amendments, U. S. Constitution impose the warrant requirement in electronic monitoring cases.
2. Whether electronically monitored conversations should be allowed "in chief" or as corroborative evidence.
3. Whether alleged overt acts in an indictment charging conspiracy under U.S.C.A., Title 18, § 371, become part of the crime charged and thereby necessitate proof of one of said "alleged" acts, especially in view of answers to a Bill of Particulars limiting the Government's disclosure on pre-trial discovery to those acts "alleged" in the indictment; and must act be committed by a member of the conspiracy.
4. Whether lower Court erred in allowing electronically monitored eavesdropping without a showing of consent on the part of the informant.

Statutory Provisions Involved

United States Code, Title 18, § 371 (pertinent part)

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statement of Case

On or about November 21, 1971 some thirty (30) weapons were stolen from an armory in Westerly, Rhode Island. On or about January 25, 1972 the weapons were found, wrapped in plastic disposal bags, submerged in a quarry at Oneco, Conn. The evidence is barren of proof with regard to whoever or whenever the weapons were so disposed of.

On March 31, 1972 A.T.F. Special Agent Salvatore Petrella and I.R.S. Special Agent William Smith recorded and monitored from a parked car the conversation of the Defendants Marrapese and Zinni surreptitiously garnered by an informant, one Daniel Lapolla who had been armed with a transmitting device in his shirt, placed there by said mentioned Agents Petrella and Smith. The conversation took place at Marrapese's place of business.

At the trial Lapolla did not testify. Defendant Marrapese did and Defendant Zinni did not. All charges against two remaining defendants were dismissed.

Defendants were each charged with one count of conspiracy and three substantive charges. The jury convicted both defendants of conspiracy and only Defendant Marrapese guilty of the three substantive charges. The trial judge

subsequently granted Defendant Marrapese's Motion for Judgment of Acquittal Notwithstanding a Verdict, leaving only the conspiracy conviction.

The taped conversation above mentioned was introduced into evidence. Marrapese testified that he had discussed rifles with Mr. Lapolla but denied any involvement with the weapons prior to March, 1972.

Reasons for Granting the Writ

POINT 1. WHETHER THE 4TH, 5TH AND 9TH AMENDMENTS, U.S. CONSTITUTION, IMPOSE THE WARRANT REQUIREMENT IN ELECTRONIC MONITORING CASES.

POINT 2. WHETHER ELECTRONICALLY MONITORED CONVERSATIONS SHOULD BE ALLOWED "IN CHIEF" OR AS CORROBORATIVE EVIDENCE.

With regard to these two points, the Petitioner respectfully moves the Court to reassess the *On Lee* and *Lopez* mandates. The Petitioner's view of the premises may be stated succinctly by quoting Judge Swygert, while writing for the majority of the Court in *United States* v. *White*, 405 F 2d 838 (7th Cir., 1969) (En Banc), Cert. granted. 394 U.S. 920, 89 S.Ct. 1305, 22 L Ed. 2d, 559 (1969), in refusing to distinguish Katz in that it "involved governmental interception of a conversation without the consent or knowledge of either party, whereas in the present case one party to the monitored conversation, (the informer) was cognizant of the Government's eavesdropping activities."

"The Government's evidence was based largely upon oral testimony by the Narcotics Agents that they overheard incriminating statements made by White to the secret informer. . . . . and transmitted by the Kel Set Device (a small transistorized device which transmits sound which

can be picked up on receiving units).....These transmitted conversations occurred in the defendant's home, automobile and place of business as well as in the informer's automobile and home."

"The surreptitious placing of the Kel Set on (the informer) was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz*. Each act was part of a 'bugging' technique by which a conversation was transmitted to an 'uninvited ear' — the Government agents. The crucial fact in each case is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker.

"To claim, as the Government does, that one party can waive the Fourth Amendment rights of another is the same thing as saying that *Katz* would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging. We are unable to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*.

"A realistic appraisal of the Defendant's conduct permits no other conclusion than that he justifiably expected his conversation to be private. The well-laid plans of the Government (narcotic) agents were made because they recognized that the Defendant sought to exclude their uninvited ears. Why else would they have hired (an) informer, placed upon his person a hidden radio transmitter, and concealed (a federal agent) in the informer's kitchen closet to overhear the Defendant's conversation? Additionally, the locations chosen for the private conversations indicate that the Defendant took reasonable steps to protect against Government intrusion.

Unlike the case before us, *Hoffa* and *Lewis* presented situations where there was no electronic interception or trans-

mission of the Defendant's statements. They stand for the proposition that an informer is a competent witness as to conversations and dealings with a defendant.

The important distinction between *Lopez* and this case is that here the informer was not produced as a witness, whereas, in *Lopez* the Government witness was a witness. *Lopez* goes no further than to hold that where an informer testifies as to conversations with a defendant, a recording of such conversation is admissible for the limited purpose of corroboration." See also *Bakes* v. *United States,* 40 S1, F 2d 838, Wills, J. U.S.D.C.

"On its facts, *On Lee* is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded (its) decisional bases. The most lethal blow to *On Lee* was dealt by the Court's overruling in *Katz* of the *Goldman* and *Olmstead* Bulwark which provided the conceptual basis for *On Lee.* The overruling of the cases, combined with the reasoning of *Katz,* leaves no scope for the *On Lee's* teaching."

The Government leaned heavily on *United States* v. *White,* 401 U.S. 745 (1971), for the introduction of this type of testimony. This case is, of course, a plurality decision in this regard.

Petitioner submits that as pointed out by Justice Brennan in the *White* case, quoting Justice Harlan in the *Katz* case, said "subsequent decisions and subsequent experience sapped whatever vitality (*On Lee*) may once have had; that it should now be regarded as overruled" and that the situation in *Lopez* "is rationally indistinguishable." The Justice Brennan added: "The reasons in support of those conclusions are set forth fully in the *Lopez* dissent and need not be repeated here. It suffices to say that for those reasons I remain of the view that the Fourth Amend-

ment imposes the warrant requirement in both the *On Lee* and *Lopez* situations. (See 52 Boston U.L.R. 831)

Petitioner further would direct the Court's attention to its rulings in the *Roe* v. *Wade* and *Doe* v. *Bolton* cases last January 22, 1973 (abortion statutes involved). The Court there indicated that the right of privacy is covered by the Ninth Amendment. It is urged that this right of privacy was infringed upon in the instant case.

See Judge Goldberg's concurring opinion in *Griswold* v. *Connecticut*, 381 U.S. 486 (birth control case).

POINT 3. WHETHER ALLEGED OVERT ACTS IN AN INDICTMENT CHARGING CONSPIRACY UNDER U.S.C. TITLE 18, § 371, BECOME PART OF CRIME CHARGED AND THEREBY NECESSITATE PROOF OF ONE OF SAID ALLEGED ACTS ESPECIALLY IN VIEW OF ANSWERS TO A BILL OF PARTICULARS LIMITING THE GOVERNMENT'S DISCLOSURE ON PRETRIAL DISCOVERY TO THOSE ACTS "ALLEGED" IN THE INDICTMENT; AND FURTHER, WHETHER SAID ACT(S) MUST BE COMMITTED BY A MEMBER OF THE CONSPIRACY.

With regard to searching the Supreme Court decision, it is respectfully submitted that the Court in *Braverman* v. *United States*, 317 U.S. 49, 53 answered this questions saying that it is still unanswered (see *United States* v. *Hirsch*, 10 U.S. 33, 34; *Pettibone* v. *United States*, 148 U.S. 197, 202; *United States* v. *Britton*, 108 U.S. 199, 205; *Hyde* v. *United States*, 225, U.S. 347, 359; *Joplin Mercantile Company* v. *United States*, 236 U.S. 531, 536).

The *Braverman* Court indicated "but it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable. . . . . .or as something apart from it, either and indispensable mode of corroborating the existence of the

conspiracy or a device for affording a locus poenitentiae."

In the instant case, Petitioner was charged with conspiracy in Count IV of a four-count indictment. The overt acts alleged to have been committed by the Petitioner pursuant to said Count IV are:

1. On or about November 21, 1971, in the district of Connecticut, Defendants David Guillette, Robert Joost, William Marrapese and Nicholas Zinni drove in two (2) vehicles to Oneco, Connecticut.

2. On or about November 21, 1971 all of the above-named defendants deposited twenty-nine (29) M-16, A-1 machine guns in the bedroom of Daniel Lapolla, Spring Lake Road, Oneco, Connecticut.

3. On or about November 23, 1971 Defendants Joost and Guillette, at Oneco, Connecticut, wrapped twenty-nine (29) M-16, A-1 machine guns in a disposal bag and dumped the weapons in a quarry in Oneco, Connecticut.

Initially it is to be noted that the case against the Defendants Joost and Guillette was dismissed.

Second, the prosecutor has admitted that Overt Acts One and Two were not proven. (Appellee's Brief at the Circuit Court, Page 6, Footnote 3.)

Thirdly, on pretrial discovery, by Bill of Particulars Request, the Government insisted that the above-mentioned three (3) acts were all that would be relied on.

The prosecutor, however, notwithstanding the above facts, asked to show, over seasonable objection by the Petitioner, an act different from those alleged for, without equivocation, he could not show that Joost and Guillette had thrown the weapons in the quarry as alleged. (Please note: the jury may have concluded that this was so because they retired to deliberate — armed with the indictment which alleged the overt act above-mentioned and the alleged perpetrators thereof, and although they were admonished by

the trial judge that an indictment is not proof of the allegation set forth therein, it was the only place in this entire trial that the perpetrators of the overt act were mentioned. How could they erase what they read from their minds?)

In requesting the Court to be able to show an unalleged act, the Government cited *United States* v. *Negro,* 164 F 2d, 168 (2nd Cir.), this case allows for proof of an unalleged act but — first, there was at least one alleged act shown and second, there was no request for a Bill of Particulars as there was in *Burlay* v. *United States,* 263 F 2d, 912.

The questions presented in the present case quite naturally arose as to what party threw the guns into the quarry? (This was never proven). When were they thrown into the quarry? (This was never proven). Was there a conspiracy by and between the parties named in the indictment? The Joost and Guillette indictment was dismissed. Was there a different conspiracy and where did it start? When were the parties Zinni and Marrapese made aware of the existence of the guns subsequent to the time charged in the present indictment and therefore not members of the alleged conspiracy? Is the reason for the first contact with Marrapese and Zinni, as reflected by the evidence, to be March 31, 1972 indicative that they were not conspirators at the time alleged to be the start of the conspiracy? These questions were never answered by proof.

In order to prove the crime of conspiracy under U.S.C. Title 18 § 371, proof of an overt act is essential, *Feswick* v. *United States,* 329 U.S. 211. It is also required that an overt act must have been committed by one or more parties to the conspiracy, *Bannon* v. *United States,* 156 U.S. 464.

The Government, at T.P. 428, acknowledges that it had not shown the identity of anyone who deposited the weapons in the quarry.

It is therefore most respectfully suggested that the Gov-

ernment has failed to prove an essential element of the crime, i.e., the commission of an overt act by a member of the alleged conspiracy.

POINT 4. WHETHER LOWER COURT ERRED IN ALLOWING ELECTRONICALLY MONITORED EAVESDROPPING WITHOUT A SHOWING OF CONSENT ON THE PART OF THE INFORMANT.

The trial judge indicated that the very fact that the informer, Daniel Lapolla, allowed himself to be suited with a transmitter was a sufficient factor from which he could conclude "consent".

The Government has the burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. *Bumper* v. *North Carolina,* 391 U.S. 543, 88 S.Ct. 1788; *Wren* v. *United States,* 352 F.2d 617; *Simmons* v. *Bomar,* 349 F 2d 365; *Judd* v. *United States,* 190 F.2d 649; *Kovach* v. *United States,* 53 F.2d 639. Its burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Bumper* v. *North Carolina,* 391 U.S. 543, 88 S.Ct. 1788; *Amos* v. *United States,* 255 U.S. 313, 41 S.Ct. 266; *Johnston* v. *United States,* 333 U.S. 10, 68 S.Ct. 367; *United States* v. *Jones,* 292 F. Suppl. 1001, 1008.

In the *Simmons* case supra, the petitioner brought a habeas corpus proceeding to test what he contended to be an illegal search and seizure. The Court at page 366 said:

> "Consent to search in order to be voluntary must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion and is not likely to be inferred. *United States* v. *Como,* 340 F.2d 891 (CA 2). The Government has the burden of proving such consent has been given. *McDonald* v. *United*

States, 307 F.2d 272 (CA 10). *Judd* v. *United States,* 190 F.2d 649.

In *United States* v. *Como,* 340 F.2d 891 (1965), Judge Kaufman of this Circuit rendered the decision. In that case, Como was working as a special employee of the Federal Bureau of Narcotics along with other agents. They were trying to make a case against one Cangiano. Simultaneously, though independently, two agents were investigating the same suspect. After hearing that an unidentified person had bought heroin from Cangiano, agents went to the hotel where the purchase was made to determine the identity of the purchaser. When Como entered the hotel and asked for his room key, the agents approached him. Como told them that he himself was an agent, but they did not believe him; and the agents refused to make a call confirming Como's identity until he acknowledged the presence of heroin. The agents then arrested Como and searched the room.

> "at 893, we recognize. . . . . .that consent to a search is not lightly inferred." *United States* v. *Viale,* 312 F.2d 595, 601 (2d Cir. 1963). The guidelines are clear. An accused's voluntary consent must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implied. Moreover, to be voluntary, a consent must have been unequivocal, specific, and intelligently given. *United States* v. *Smith,* 308 F.2d 657, 663 (2d Cir. 1962) cert. den. 372 U.S. 906, 83 S.Ct. 717. See also *Channel* v. *United States,* 284 F.2d 217, 219 (9th Cir. 1960).

The trial Court also adopted *United States* v. *McKeever*, 169 F.Supp. 426 as the law in this case. The seventh prong of the Solomon test adopted by McKeever is that the testimony elicited was freely and voluntarily made without any kind of duress.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 192—September Term, 1973.
(Argued September 25, 1973 Decided October 26, 1973.)
Docket No. 73-1600

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

WILLIAM MARRAPESE and NICHOLAS ZINNI,
Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge;*
MOORE and MANSFIELD, *Circuit Judges.*

Appeal by William Marrapese and Nicholas Zinni from judgments of conviction after a jury trial (T. Emmet Clarie, *Judge*) of conspiring to possess, conceal and retain certain firearms moving in interstate commerce with knowledge that said firearms had been stolen.

Judgments affirmed.

ANDREW A. BUCCI, Providence, Rhode Island, *for Appellant Marrapese.*

JOHN A. O'NEILL, JR., Providence, Rhode Island, *for Appellant Zinni.*

PAUL E. COFFEY, Special Attorney, United States Department of Justice, Washington, D. C. (Stewart H. Jones, United States Attorney for the District of Connecticut, Bridgeport,

Connecticut, and Jeffrey M. Johnson, Special Attorney, United States Department of Justice, Washington, D. C., on the brief), *for Appellee.*

MOORE, *Circuit Judge:*

Appellants, William Marrapese and Nicholas Zinni, appeal from judgments of conviction of conspiracy (18 U.S.C. §371) to violate the National Firearms Act (Count IV of a four-count indictment). The indictment had charged these appellants, together with Robert Joost and David Guillette, in three substantive counts, Count ONE, concealment and retention for their own use of 30 machine guns, knowing them to have been stolen, 18 U.S.C. §641; Count TWO, possession of unregistered firearms, 26 U.S.C. §5861(d); Count THREE, concealment of stolen firearms moving in interstate commerce, 18 U.S.C. § 922(j); and a conspiracy count, Count FOUR. All but the conspiracy count are academic upon this appeal because the indictment was dismissed as to Joost and Guillette, the jury found Zinni not guilty on the three substantive counts, and the trial judge granted Marrapese's motion for acquittal notwithstanding the guilty verdict on the substantive counts. Left for our appellate consideration are appellants' convictions on the conspiracy count.

The eleven errors asserted may be divided into two principal categories (1) insufficiency of the evidence, and (2) error in the admission of tape recordings and a transcript thereof. These alleged errors were brought before the trial court upon the motion for acquittal, notwithstanding the verdict for a new trial and upon a supplemental motion for a new trial heard upon allegedly discovered new evidence. Both motions were denied. The motion and supplemental motion have been made a part of the record on appeal.

On November 21, 1971, 30 machine guns (M-16) were stolen from the Westerly, Rhode Island National Guard Armory. On January 25, 1972, 29 of these 30 guns were recovered by government agents from underwater in a quarry in Oneco, Connecticut. They had been wrapped for protective purposes in plastic bags. They were not equipped with bolts necessary for their operation.

Upon this solid factual foundation was erected a factual and inferential superstructure.

Nearby in Oneco (approximately a mile and a half from the quarry), lived Daniel Lapolla,[1] a figure of prime importance in the case. A few hours after the theft, a telephone call was placed from Zinni's Cranston, Rhode Island, residence to Lapolla's Oneco residence at an early morning hour, approximately 6:34 A.M. On November 22, 1971, a telephone call was made from Marrapese's Cranston, Rhode Island, residence to Lapolla's residence. These were the only calls made in November 1971 between these persons. Although the guns had been retrieved from the quarry by government agents in January, 1972, appellants were apparently unaware of this fact.

The next critical series of events occurred on March 31, 1972. Lapolla, as a government informer, had allowed himself to be equipped with a radio transmitter. On the receiving end were two government agents, Petrella and Smith.

Unmindful that the guns were no longer in the quarry, Lapolla, Marrapese and Zinni engaged in a conversation (tape recorded) concerning the "rifles." The tapes and the transcript thereof (Govt. Exh. 10) best identify their participation in the conspiracy.[2]

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[1] Shortly before the trial, Lapolla was murdered—a fact which was not disclosed to the jury.

[2] Lapolla: He promised. Hey. Ahh. Get the door. I got a deal.
Marrapese: What kind of deal?
Lapolla: Ahh. (door closes) Met a guy in New York.

The evidence must be considered in the light most favorable to the Government, *United States* v. *Barash*, 412 F.2d 26, 31 (2d Cir.) *cert. denied*, 396 U.S. 832 (1969). A jury

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Marrapese: Yeah.
Lapolla: And ahh. You know the M-Sixteens those guys buried down there?
Marrapese: Yeah.
Lapolla: He thinks he can get the bolts. What should I say to him you want? (unclear) Can you handle it?
Marrapese: What for, the rifles?
Lapolla: Yeah.
Marrapese: You know where the rifles are.
Lapolla: Yeah. Well, let them go down and dive for them. What do I know. You think they could?
Marrapese: Yeah. They'd go.
Lapolla: All right. (unclear)
Marrapese: They was thirty rifles, right?
Lapolla: There were twenty-nine. The other one (unclear)
Marrapese: There was one stolen. Yeah. (increased noise)
Zinni: He wants to buy the rifles?
Lapolla: Yeah. He thinks he can get the bolts.
Marrapese: Tell him a hundred a piece.
Lapolla: A hundred a piece. Will Bobby and Davie go down and get-em?
Marrapese: We'll get someone down there.
Lapolla: Ha-ha. All right. Yeah. That's all.
Marrapese: No, it ain't. You're going to come down and transport them, Danny.
Lapolla: I ain't gonna handle-em.
Marapese: He going to come down and pick-em up?
Lapolla: Yeah. Let him come down. (unclear) It's between you and the other guy. You know?
Lapolla: Hey. How will I know?
Marrapese: What?
Lapolla: They got the ahh (unclear) Bobby.
Marrapese: Yeah. I'll see him about it Monday.
Lapolla: Swell. And ahh. How will I know?
Marrapese: Look. When you going to be here? When? Tuesday?
Lapolla: Yeah.
Marrapese: Yeah. Tell the guy O.K.
Lapolla: Cause I'll see him Saturday again. (unclear)
Marrapese: When are you going to see the guy? Saturday?
Lapolla: Yeah.
Marrapese: Tell him, ahh. It will take about a week to get them.
Lapolla: About a week to get them?
Marrapese: Yeah. Ahh. It's a little chilly right now.

might well have concluded that Marrapese on the tape was speaking of the rifles in a proprietory fashion, and not as one merely interested in the cash proceeds. The jury evidently did not credit Marrapese's testimony that he was interested only in getting the debt Lapolla owed him paid. As for Zinni, he said only one sentence, "He wants to buy the rifles?" Yet once a conspiracy is shown, only slight evidence is needed to link another defendant with it, *United States* v. *Knight,* 416 F.2d 1181, 1184 (9th Cir. 1969); *Bradford* v. *United States,* 413 F.2d 467, 469 (5th Cir. 1969). Furthermore, the telephone call from Zinni's home to Lapolla's home early in the morning the day the rifles were stolen, Zinni's presence during the conversation between Marrapese and Lapolla concerning the guns, and his acknowledgment of the significance of the conversation provide enough proof for the jury to link him with the alleged conspiracy.

Appellants argue that the case should not have been submitted to the jury because there was no proof of an overt act. The trial judge in his opinion on the motion for acquittal n.o.v. and a new trial stated: "The concealment of the M-16 rifles, independently proven, is the very essence of the third overt act." As to the claim by appellants of a variance, the court ruled that "Any variance between the indictment and the proof with respect to the third overt act was of minor significance;". No claim of surprise was made during the trial. Nor was there any request for a continuance based on any alleged variance.

The argument that the tape recording of appellants' conversations with Lapolla was improperly admitted is without merit. Lapolla consented to wearing the transmitting device. The trial judge out of the presence of the jury passed upon its audibility. There was adequate testimony from which the jury could draw its conclusions as to voice

identification and the accuracy of the transcript. The tape and transcript were properly admitted. For a thorough discussion of the law in this Circuit relating to the admissibility of tapes and transcripts, see *United States* v. *Bryant*, —— F.2d ——, decided June 4, 1973, Slip. Op. pp. 3943-3956.

As a basis for appellants' supplemental motion for a new trial, appellants claim to have discovered a transcript of a statement by Lapolla in an unrelated New Jersey proceeding that he had taken numerous tapes "on my [his] own." The trial court properly held that there was "nothing inconsistent between Lapolla's statement to the New Jersey authorities and the testimony of Agents Smith and Petrella that they, and not Lapolla, made the recording introduced at trial as Government's Exhibit 11."

As appellants correctly argue, resolution of the factual issues here depends on many inferences. The legal requirement is that there be a factual foundation from which the jury can draw these inferences. The government has met this burden here.

Judgments affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the twelfth day of November One thousand nine hundred and seventy-three

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,
HON. LEONARD P. MOORE,
HON. WALTER R. MANSFIELD,
Circuit Judges.

73-1600

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM MARRAPESE, NICHOLAS ZINNI,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Crim. No. H-264

UNITED STATES OF AMERICA
v.
WILLIAM MARRAPESE
and NICHOLAS ZINNI

RULING ON DEFENDANTS' MOTIONS FOR ACQUITTAL N.O.V. AND A NEW TRIAL

The September 29, 1972, murder of Daniel Lapolla, the government's chief witness whose Grand Jury revelations and anticipated courtroom testimony precipitated the defendants' indictment, makes this a most unusual case. Lapolla, whose death occurred shortly after it was disclosed that he was a government informant, was killed when a dynamite explosion ripped through his home in Sterling, Connecticut, as he was about to enter the front door.

The government nevertheless proceeded against two of the four defendants, William Marrapese and Nicholas Zinni, who were tried together before a jury. Marrapese was convicted on all four counts charged in the indictment: (1) concealing and retaining 30 United States Army M-16 machineguns, knowing the same to have been stolen, in violation of 18 U.S.C. § 641; (2) knowingly possessing 30 United States Army M-16 machineguns, which had not been registered, in violation of 26 U.S.C. § 5861(d); (3) concealing, storing, and disposing of stolen firearms in violation of 18 U.S.C. § 922(j); and (4) conspiracy to commit said offenses in violation of 18 U.S.C. § 371. The other defendant, Zinni, was convicted only on the conspiracy count and was found not guilty of the three substantive offenses.

Both defendants have now moved for a judgment of acquittal notwithstanding the verdict, or in the alternative, a new trial, pursuant to Rules 29c and 33, respectively, of the Federal Rules of Criminal Procedure. The defendant Zinni's motion for acquittal is denied. The defendant Marrapese's motion for acquittal is granted with respect to the substantive counts only, and is denied with respect to the conspiracy conviction. The defendants' motion for a new trial is also denied.

COMMON ISSUES

Government Exhibit 11 was a tape recording of a conversation between Daniel Lapolla, Nicholas Zinni, and William Marrapese made under the supervision of two federal agents at Marrapese's place of business on March 31, 1972. Government Exhibit 15 was a typewritten transcript of that recorded conversation. The defendant argue that neither the recording, nor the written transcript thereof, should have been admitted into evidence. The Court finds the defendants' arguments on this point unpersuasive.

The recording in question was first played out of the presence of the jury. The Court determined that while it was not perfect, it was sufficiently audible, intelligible, and trustworthy. *United States* v. *Kabot,* 295 F.2d 848, 853 (2d Cir. 1961), *cert. denied,* 369 U.S. 803 (1962); *Gorin* v. *United States,* 313 F.2d 647, 651-652 (1st Cir. 1963), *cert. denied,* 374 U.S. 829 (1963); *Addison* v. *United States,* 317 F.2d 808, 815-816 (5th Cir. 1963), *cert. denied,* 376 U.S. 905 (1963); *Todisco* v. *United States,* 298 F.2d 208, 211 (9th Cir. 1961), *cert. denied,* 368 U.S. 989 (1962); *Monroe* v. *United States,* 234 F.2d 49, 54-55 (C.A.D.C. 1956), *cert. denied,* 352 U.S. 873 (1956).

The fact that a written transcript of a recorded conversation is used is not evidence that the recording from which it is prepared is unintelligible or inaudible. In *Uni-*

ted States v. *Hall*, 342 F.2d 849 (4th Cir. 1965), *cert. denied*, 382 U.S. 812 (1965), the Court upheld the admission of a transcript of a tape recording which the jury followed while listening to that recording. The Court said:

> "The transcript served to assist the jury in following the conversation by identifying the various speakers; and had it not been for this device, it would have been necessary . . . to constantly interrupt the playing of the tape to indicate which of the parties made a particular statement." *Id.* at 853.

The transcript in question served a similar function in the present case. Although *United States* v. *Schanerman*, 150 F.2d 941, 944 (3rd Cir. 1945) upheld the exclusion of transcribed notes of a recorded conversation, it gave no reason for doing so. *United States* v. *Hall*, *supra*, 342 F.2d at 853. In the Court's view, the *Hall* approach is sound and does not conflict with *United States* v. *Maxwell*, 383 F.2d 437, 442 (2d Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968).

The reliability of government Exhibit 15 is established not only by the testimony of Special Agent Petrella, who testified that he had listened many times to the recording from which it was prepared, that he could recognize the voices thereon, and that the transcript was accurate, but by the testimony of the defendants' own witness. Robert B. Richmond, the Director of Consulting Services for Voice Print Laboratories of Somerville, New Jersey, testified at the hearing on the defendants' motion for acquittal N.O.V. and a new trial. He stated that he had listened several hundred times to portions of the tape recording from which the transcript was made, (Tr. 138),[1] and that he also heard on Government Exhibit 11 the following sen-

[1] All transcript citations are to the transcript of the hearing on the defendants' motions for acquittal and a new trial.

tences which are attributed to Mr. Marrapese on Government Exhibit 15: (1) "What for the rifles?" (2) "You know where the rifles are?" (3) "Yeah, they'd go." (4) "They was thirty rifles, right?" (5) "Tell him a hundred a piece." (6) "We'll get someone down there." (7) "No, it aint. You're going to come down and transport them, Danny." and (8) "He going to come down and pick 'em up?" Although Mr. Richmond did not analyze all of these sentences for the purpose of determining who spoke them, he himself identified Mr. Marrapese as having spoken the sentences, "You know where the rifles are?" and, "They was thirty rifles, right?" (Tr. 132-133).

The use of the transcript in conjunction with the recording from which it was prepared was entirely proper and analogous to the use of charges and exhibits prepared by government witnesses as an aid to the jury. *See e.g., United States* v. *Shenk,* 126 F.2d 702, 708-09 (2d Cir. 1942) *cert. denied, sub nom. Moskowitz* v. *United States,* 316 U.S. 705 (1942).

The defendants assert that the government's informant, Daniel Lapolla, did not "consent" to the wearing of the electronic transmitting device used in the recording of Government Exhibit 11. Putting aside the Government's argument that this objection should have been raised by way of a motion to suppress shortly after the indictment was handed down and before Mr. Lapolla's untimely death on September 29, 1972, the Court finds the defendants' contention to be without merit. Agent Petrella testified at trial as to the voluntariness of Lapolla's wearing of this device. Moreover, the defendants have no standing to assert Mr. Lapolla's rights vicariously. *United States* v. *Alderman,* 394 U.S. 165, 173-174 (1969); *United States* v. *San Martin,* —— F.2d —— (2d Cir. 1972), slip opinion No. 79 (November 10, 1972).

The defendants' reliance upon *Roe* v. *Wade,* 41 U.S.L.W.

4213 (January 22, 1973) and *Doe* v. *Bolton*, 41 U.S.L.W. 4233 (January 22, 1973), is ingenious, but misplaced. *United States* v. *White*, 401 U.S. 745 (1971), is more persuasive in this context. This Circuit's reliance upon *White* in *United States* v. *San Martin, supra,* confirms that *White* should be followed here. *See also United States* v. *Kaufer*, 406 F.2d 550, 552 (2d Cir. 1969), *aff'd*, 394 U.S. 458 (1969).

A. THE DEFENDANT MARRAPESE

The three substantive counts of the indictment charge that on or about November 21, 1972, the defendants Marrapese, Zinni, Joost, and Guillette (1) concealed and retained with intent to convert 30 United States Army M-16 machineguns, knowing the same to have been stolen, in violation of 18 U.S.C. § 641;[2] (2) wilfully and knowingly possessed unregistered firearms in violation of 26 U.S.C. § 5861(d);[3] (3) concealed, stored and disposed of 30 M-16 rifles, which were moving as, were part of, and constituted interstate commerce, knowing and having reasonable cause to believe that said firearms were stolen, in violation of 18 U.S.C. § 922(j).[4]

The government produced evidence that all of the M-16

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[2] 18 U.S.C. § 641 provides, in pertinent part:

"Whoever . . . conceals, or retains [a thing of value of the United States] with intent to convert to his own use or gain, knowing it to have been . . . stolen . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years or both . . . ."

[3] 26 U.S.C. § 5861 provides, in pertinent part:

"It shall be unlawful for any person —

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record. . . ."

[4] 18 U.S.C. § 922(j) provides, in pertinent part:

"It shall be unlawful for any person to receive, conceal, store . . . or dispose of any stolen firearm . . . which is a part of, or which constitutes, interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm . . . was stolen."

rifles in question were stolen from the Westerly Armory on November 21, 1971, and were subsequently recovered on January 25, 1972, by government agents from the bottom of a quarry in Oneco, Connecticut, where they were found wrapped in plastic bags and lying under 15-20 feet of water. It also produced evidence of a taped conversation on March 31, 1972, between Marrapese, Zinni, and Lapolla, at Marrapese's place of business in Cranston, Rhode Island. Except for one sentence on the tape, namely, "They was one stolen, yeah," Marrapese admitted that he did in fact speak the words attributed to him on the tape recording and the written transcript of that conversation. He claimed, however, that it was Lapolla, and not he, who had obtained the rifles and that his only interest in the transaction was the hope and expectation that he would be paid part of the proceeds which Lapolla might receive from the sale of the rifles in settlement of a pre-existing debt owed to him by Lapolla.[5]

From the guilty verdict, it is apparent that the jury found Marrapese's version of the facts incredible. Viewing the evidence in a light most favorable to the government, the Court finds that the jury properly exercised its prerogative in weighing the credibility of the testimony before it. The jury could have reasonably inferred that at the time of the March 31, 1972, conversation Marrapese *believed* that he still constructively possessed the weapons at the bottom of the quarry. However, as a matter of law, the jury could not have found on the three substantive counts that Marrapese either actually or constructively possessed these weapons at that time, because any dominion which he may have previously exercised over them ceased

[5] Interestingly, Marrapese testified that he maintained a separate account book in which to record financial transactions with Daniel Lapolla.

in fact, upon their recovery from the Oneco quarry by federal agents on January 25, 1972.

The only evidence of any activity on the part of Marrapese prior to the recovery of the rifles on January 25, 1972, was the record of a telephone call having been made from Marrapese's home to the home of Daniel Lapolla, a few days after the November 21, 1971, theft.[6] However, there was no direct evidence as to the content of that call or who actually made it. While such evidence might have been relevant to corroborate eyewitness testimony, were it available, it does not itself establish possession, concealment, or retention. Moreover, Marrapese's belief that he possessed the weapons on March 31, 1972, does not provide an adequate basis from which to infer that he himself committed the substantive offenses on or about the date charged in the first three counts of the indictment. Unlike the fourth count of the indictment, which alleges a conspiracy beginning on November 21, 1971 and *operating continuously thereafter,* up to and including the date of the filing of the indictment on May 3, 1972, the first three counts allege criminal conduct which occurred on or about a specific date, namely, November 21, 1971. There is a material variance of proof and inadequate evidence that Marrapese's concealment, possession, and retention of the weapons reverted back to the specific date alleged. While the Court is not persuaded by the defendants' argument that an inference "cannot be based on another inference," *see e.g., United States* v. *Eustace,* 423 F.2d 569, 570 (2d Cir. 1970), and I Wigmore, Evidence (3rd ed. 1940) § 41, it does conclude that to permit an inference of possession, concealment, and retention to apply retroactively to the date

[6] Marrapese does not deny making this telephone call. Rather, he states that he called Lapolla frequently in connection with odd jobs that the latter performed at Marrapese's place of business, American Universal Gold Buyers.

charged in the substantive counts of the indictment would do violence to the principle that guilt must be established beyond a reasonable doubt.

The defendant Marrapese also relies upon *United States* v. *Negro,* 164 F.2d 168 (2d Cir. 1947), as a defense to his conspiracy conviction. In that case, the Court held that the substitution of an alleged for an unalleged overt act did not constitute a fatal variance, but merely justified a continuance in the event of surprise. The Appeals Court reversed the decision below, however, because the trial judge "had instructed the jury only as to this act [the alleged but unproven act] and had not instructed the jury as to the proven (but unalleged) act. *United States* v. *Armone,* 363 F.2d 385, 400 (2d Cir. 1966). Stated differently, that Court held that there was no evidence in the trial record of the only overt act alleged in the indictment. This is clearly not so in the present case, and at trial the Court ruled that there was not a material variance between the allegations and the proof.

The third overt act alleged in the indictment states that, "On or about November 23, 1971 defendants [Robert] Joost and [David] Guillette, at Oneco, Connecticut, wrapped twenty-nine M-16 A1 machineguns in a garbage disposal bag and dumped the weapons in a quarry in Oneco, Connecticut." The object of the conspiracy, as set forth in the indictment, was to conceal the weapons until they could ultimately be sold. The Government established not only that the weapons were stolen in Westerly, Rhode Island, but that they were recovered in a quarry in Oneco, Connecticut, where they had been deposited wrapped in green plastic disposal bags. The government also established the existence of a conversation between Daniel Lapolla, William Marrapese, and Nicholas Zinni, wherein Lapolla referred to the M-16's "those guys buried down

there" and asked Marrapese if "Bobby" and "Davie" would "go down and get 'em.'" Marrapese responded "We'll get someone down there," thus confirming his knowledge of the whereabouts of the stolen guns and his control over them.

United States v. *Armone, supra,* and to some extent, *Fassoulis* v. *United States,* 445 F.2d 15, 19 (2d Cir. 1971), *cert. denied,* 404 U.S. 858 (1971), indicate that *Negro's* approval of the substitution of an unalleged for an alleged overt act remains valid. If such a substitution does not create a fatal variance, it follows that such a variance does not result when there is both proof of the substance and essence of an overt act which has been alleged, and an accompanying failure of defense counsel to request a continuance which would suffice even in a case where a substitution has been permitted.

The concealment of the M-16 rifles, independently proven, is the very essence of the third overt act. The circumstances under which they were recovered are such that it would defy common sense to say that they were not concealed. The fact that the weapons lacked bolts and were wrapped in plastic disposal bags, thus affording protection from the elements; indicates that they were concealed pursuant to a plan to recover them at a later date. Marrapese's admission, during the course of the conversation between Lapolla, Zinni, and him, that he "knew the M-16's those guys buried down there," and his statement that, "We'll get someone down there," provide an adequate basis upon which the jury could have found that Marrapese knew where, how, and by whom the stolen rifles were concealed, and that said rifles were, in fact, concealed prior to January 25, 1972, by persons acting in concert with him. Any variance between the indictment and the proof with respect to the third overt act was of minor significance; and counsel for the defense declined to request a continu-

ance on the grounds of possible surprise, even after having been apprised by the Court of language in *United States* v. *Negro, supra,* 168 F.2d at 173, which states a variance justifies a request for continuance. No request having been made, the Court specifically found that there was no surprise.

On the basis of Marrapese's conversation wherein he expressed knowledge of the "M-16's those guys buried down there," and set the price at which they were to be sold, there is ample evidence that he had acquired a stake in the venture. *United States* v. *Falcone,* 109 F.2d 579, 581 (2d Cir. 1940), *aff'd,* 311 U.S. 205 (1940); *United States* v. *Cianchetti,* 315 F.2d 584 (2d Cir. 1963). The fact that the weapons in question were actually recovered from the quarry by the government before the conversation took place does not provide a defense to the charge of conspiracy. *Craven* v. *United States,* 22 F.2d 605, 609 (1st Cir. 1927), *cert. denied,* 276 U.S. 627 (1928); *Beddow* v. *United States,* 70 F.2d 674, 676 (8th Cir. 1934); *State* v. *Moretti,* 97 N.J. Super. 418, 235 A.2d 226 (1967).[7]

B. THE DEFENDANT ZINNI

Where the existence of a conspiracy is shown, only slight additional evidence is required to connect a particular defendant with it. *United States* v. *McGann,* 431 F.2d 1104, 1106-1107 (5th Cir. 1970); *United States* v. *Pardo-Bolland,* 348 F.2d 316, 325 (2d Cir. 1965), *cert. denied,* 382 U.S. 944 (1965). In viewing the evidence against the defendants,

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[7] Cf. *Developments in the Law: Criminal Conspiracy,* 72 Harv. L.Rev. 920, 945 (1959), and Note, *Impossibility in Conspiracy,* 15 Wash. and Lee L.Rev. 122, 123-27 (1958), criticizing *Ventimiglia* v. *United States,* 242 F.2d 620, 625-26 (4th Cir. 1957). The conspiracy in the present case had a clear "anti-federal object" and presented a very real "federal danger." 72 Harv.L.Rev., *supra.* Also see, *United States* v. *Jacobs,* ___ F.2d ___ (2d Cir., Mar. 5, 1973), slip op. at 2110, n.27.

"the court must 'compartmentaliz[e] the evidence with regard to each particular defendant . . . keeping clearly in mind the full circumstances of each transaction . . . [so] that justice may be meted out to the individual rather than to the group.' However, the different acts and statements of each defendant relied upon to establish the charge against him and his knowing participation in the claimed conspiracy are not to be viewed in isolation; they are to be considered in their relation to his other acts and statements, and the totality of his conduct is to be viewed in its relation to the totality of the conduct of each other defendant. Only in this way can a proper determination be made as to whether the claimed conspiracy existed and, if it did, whether a particular defendant was a knowing participant. Thus, a single conversation may be innocent or reflect no illicit purpose, and by itself permit no inference of wrongful conduct; so, too, even a discussion apparently relating to an illicit activity followed by the removal and delivery by one of the conversing participants to the other of a brown paper bag may have no particular significance. But when considered with other incidents, some of them clandestine, all related in purpose, and by itself permit no inference of wrongful of a substantial quantity of narcotics, each incident not only gains color from the others, but may permit a reasonable inference they were in furtherance of a conspiratorial objective." (footnotes omitted). *United States* v. *Beigel,* 254 F.Supp. 923, 932-933 (S.D. N.Y. 1966), *aff'd,* 370 F.2d 751 (2d Cir. 1967); *cert. denied,* 387 U.S. 930 (1967).

The government produced evidence of a telephone call made from Zinni's home to the home of Daniel Lapolla at

approximately 6:30 A.M. on the morning of November 21, 1971, a few hours after the theft of the thirty (30) M-16 rifles from the Westerly Armory; and there was evidence of a taped statement made by Zinni during the March 31, 1972, conversation concerning the exact same guns which had been stolen from the Armory. That statement, which the government had originally attributed to Marrapese, consists of six words: "He wants to buy the rifles." It is significant that this sentence was spoken by Zinni in the context of a conversation in which Lapolla asked Marrapese if he "knew the M-16's those guys buried down there," and informed Marrapese and Zinni of a man in New York who indicated he could obtain bolts for them. The testimony of Captain Marchetti of the Rhode Island National Guard established that the weapons stolen were without bolts, because it was the usual practice to store them in a locked compartment separate from the guns.

Although Marrapese took the witness stand and claimed that Zinni's voice did not appear on Government Exhibit 11 and that, in fact, Zinni was not even present during the conversation with Lapolla, Agent Petrella testified that Zinni had indeed spoken the words which were attributed to him on Government Exhibits 11 and 15. Although Zinni himself did not testify, the jury had an opportunity to weigh Agent Petrella's testimony against that of Marrapese, and to consider whether the latter's testimony was motivated by a desire to protect a co-conspirator, thus demonstrating a consciousness of guilt. From the jury's verdict, it is apparent that they believed not only that Zinni spoke the words in question, but that the words did not constitute an innocent remark, or a statement expressing disbelief, or a mere repetition of words which the speaker may have thought he had heard spoken by another

and offhandedly repeated in order to make sure that he had understood them correctly.

There was sufficient evidence from which the jury could have found not only that Zinni had knowledge of the criminal scheme, *United States* v. *Cianchetti*, 315 F.2d 584, 587-588 (2d Cir. 1963), but that he had acquired a stake in the outcome of the plan to dispose of the stolen weapons over which they mistakenly believed they exercised dominion. *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940).

The Court has carefully considered each of the numerous other arguments mustered in support of the defendants' motions, and finds that they do not warrant the requested relief. With the exception of the defendant Marrapese's motion for acquittal N.O.V. on the three substantive offenses, which is granted, all of the defendants' remaining motions are denied; and it is SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of March, 1973.

(s) T. Emmet Clarie
United States District Judge